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SHUSHING THE NEW AESTHETIC VOCABULARY: APPROPRIATION ART UNDER THE CANADIAN COPYRIGHT REGIME

KAREN LOWE[†]

In adopting pre-existing works as source material to convey new meanings and understandings, appropriation art is an integral avenue of artistic expression. However, the narrow fair dealing exception provides little protection to artists who engage in this form of social commentary, a form which necessitates reproducing the original copyrighted work for a successful referential analysis. This paper will explore the unique challenge that appropriation art poses to the Canadian copyright law. As a preliminary matter, the author will discuss the conceptual basis behind this aesthetic practice and situate it within traditional notions of authorship. The author moves on to examine the current Canadian jurisprudence under the case of Michelin and compares this approach to American developments under its broader fair use doctrine. It is argued that the fate of appropriation art as a legally valid practice largely depends on the recognized policy objectives of a given copyright regime. While developments in Thérberge and CCH Canadian Ltd. seem to offer hope to the appropriation artist, short of a possible Charter challenge to the Copyright Act, they do little to change the exhaustive nature of the fair dealing exceptions. The author concludes that the most viable solution to accommodating appropriation art in the Canadian copyright regime is through statutory reform akin to the more flexible fair use standard.

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All authorship is fertilized by the work of prior authors, and the echoes of old work in new work extend beyond ideas and concepts to a wealth of expressive details. Indeed, authorship is the transformation and recombination of expressions into new molds, the recasting and revision of details into different shapes. What others have expressed, and the ways they have expressed it, are the essential building blocks of any creative medium...The use of the work of other authors in one's own work inheres in the authorship process.¹

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.²

INTRODUCTION

The great Spanish painter, Pablo Picasso, once remarked, “[t]he artist is a receptacle for the emotions that come from all over the place: from the sky, from the earth, from a scrap of paper, from a passing shape, from a spider’s web”.³ Artists have historically drawn inspiration from their surroundings, each new landscape and vista being a potential starting point for artistic expression to take flight. However, given the increasingly ubiquitous nature of commercial and mass-mediated images in our daily lives, it should not come as a surprise that these images are integral to the artistic expressions of our times. The ever-imposing billboards, the omnipresent advertisements in bathroom stalls, classrooms, and ‘Google Earth’ searches – these make up the new aesthetic vocabulary in an emerging postmodern artistic practice coined ‘appropriation art’.⁴

¹ Jessica Litman, “Copyright as Mythe” (1991) 53 U. Pitt. L. Rev. 235 at 243-44.

² *Bleistein v. Donaldson Lithography Co.*, 188 U.S. 239 at 251 (1903) [*Bleistein*].

³ “Pablo Picasso Quotes,” online: Artquotes.net < http://www.artquotes.net/masters/picasso_quotes.htm >.

⁴ See also John Carlin, “Culture Vultures: Artistic Appropriation and Intellectual Property Law” (1988) 13 Colum.-V.L.A. J.L. & Arts 103 at para 111: “In the present century, culture functions as the ideal artistic referent...contemporary artists should be free to reproduce our ‘nature’ even if some of it is made of commercial signs and imagery protected by copyright”.

Appropriation art can be described as “a postmodern technique using images fundamental to a culture (and therefore not created by the artist, who creates from the standpoint of the outsider) to make a point about that culture”.⁵ It is a practice that functions by using pre-existing works, oftentimes entire works, and adopting them as source material to convey new messages and understandings. Appropriation has been well-accepted in the art world as a valid and significant technique, utilized by noted artists including French artist Marcel Duchamp, and the influential American pop-artist, Andy Warhol.⁶ However, what may be called ‘appropriating’ or ‘borrowing’ in the art world raises legal concerns respecting copyright infringement, especially because the elements that comprise the new aesthetic vocabulary are often copyrighted works. The practice of appropriation necessarily competes with copyright interests, because the law prohibits substantial reproduction of copyrighted works.⁷ Consequently, the question in most cases is not whether the copyright holder’s right has been infringed, but rather, whether the artist can show her dealing is nevertheless allowable under the fair dealing exception.

Canadian copyright jurisprudence in respect to appropriation works is a murky, uncharted terrain, owing largely to the extremely narrow scope of the fair dealing exceptions under the *Copyright Act*.⁸ The exhaustive list

⁵ Niels B. Schaumann, “An Artist’s Privilege” (1997) 15 Cardozo Arts & Ent. L.J. 249 at 252 [Schaumann].

⁶ Duchamp’s *L.H.O.O.Q.* is a direct copy of Leonardo’s *Mona Lisa* with a moustache painted on. It is said to be humorous comment on the original artist’s homosexuality. Warhol was an American artist who is known for his paintings of American household products such as *Campbell’s Soup* (1968), as well as his mass-produced silkscreen prints of famous persons. See Elton Fukumoto, “The Author Effect After the ‘Death of the Author’: Copyright in a Post-modern Age” (1997) 72 Wash. L. Rev. 903 at 919 [Fukumoto].

⁷ Appropriation art also raises issues of trademark and moral rights issues. See e.g. *Mattel Inc. v. Walking Mountain Productions* 353 F.3d. 792 (9th Circ. 2003)[*Mattel*]. The Court held the artist’s use of Mattel’s Barbie dolls in his photographs did not infringe the plaintiff’s trademark because any public interest in free and artistic expression outweighed the plaintiff’s interest in any potential consumer confusion. See also Patricia Loughlan, “Moral Rights (A View from the Town Square)” (2000) Media & Arts Law Review 1, where the author argues that, “moral rights, by canonizing the artist and consecrating the work, may function to separate the discursive practices of art from daily life and thereby inhibits art’s cultural and political power”.

⁸ R.S.C. 1985, C-42 [*Copyright Act* or *Act*].

of protected purposes under fair dealing does not include parody, a purpose that has been successfully relied upon as a defence by American artists under the broader and more flexible fair use doctrine. The current uncertainty stifles artistic expression, as hesitant Canadian artists fear being exposed to liability. They must tread lightly in deciding what ‘mirror’ to use in order to evince a telling social commentary while also according with the law. At the same time, the ever-shrinking public domain fails to benefit from these invaluable intellectual works. As Justice Leval enunciated, “[m]onopoly protection of intellectual property that impede[s] referential analysis and the development of new ideas out of old would strangle the creative process”.⁹

This paper will explore the unique challenge that appropriation art poses to the Canadian copyright regime, and argue that the Canadian fair dealing provisions must be reformed to accommodate appropriation practices as integral avenues of artistic expression. Part I will discuss the conceptual basis of appropriation art, and how it is situated in direct opposition to copyright law. Part II will examine the Canadian jurisprudence on appropriation art in the leading decision of *Cie Générale des Établissements Michelin-Michelin & Cie v. C.A.W.*,¹⁰ and compare this approach to American developments under its fair use doctrine. It will discuss how the fate of appropriation art as a legally valid practice largely depends on the recognized policy objectives of a given copyright regime. Part III will survey the available avenues to ameliorate the Canadian jurisprudence with that of the United States, in light of recent developments by the Supreme Court of Canada. It will conclude that despite these promising developments, the only realistic solution is that of parliamentary reform.

⁹ Pierre J. Leval, J., “Toward a Fair Use Standard” (1990) Harv. L. Rev. 1105 at 1109 [Leval]. Justice Leval’s article was formative in the development of the transformative use test under the fair use doctrine, and has been copiously cited by subsequent American case law.

¹⁰ (1996), 71 C.P.R. (3d) 348 (F.C.T.D.) [*Michelin*].

PART I: A PRIMER ON APPROPRIATION ART AS POSTMODERN PRACTICE

An examination of appropriation art reveals a number of conceptual frameworks that provide an impetus to this particular type of aesthetic practice. Firstly, appropriation art stands as a form of social critique. It is a commentary that sheds light on the pervasive nature of commercial images and how the prevalence of mass media in our society has come to dominate our understandings and the way in which we make meaning in our daily lives. By taking a well known, ordinary image that is part of our collective consciousness and reframing it in a way that is strange and unordinary to the viewer, the appropriation artist can question taken for granted assumptions:

When an artist appropriates an existing image from mass culture, takes it out of context and places it in a gallery..., the viewer will often examine that image much more closely than she would if she found it on the pages of a magazine. In the process, she may discover that the values embodied in that image, of really 'seeing' it, has forced her to consider the operation of a process that she performs uncritically everyday.¹¹

In a series of black and white pencil sketches entitled *There must be 50 ways to kill your lover*, nationally-renowned Canadian artist, Diane Thorneycroft depicts familiar wives from popular culture murdering their husbands.¹² For instance, in one piece, Thorneycroft portrays Miss Piggy happily enjoying a martini, after just having strangled Kermit the Frog who is shown lying on the floor breathlessly clutching his neck. Another sketch depicts Marge Simpson grinning with Homer Simpson's lifeless body on her lap. She has

¹¹ E. Kenly Ames, "Beyond *Rogers v. Koons*: A Fair Use Standard for Appropriation" (1993) 93 Colum. L. Rev. 1473 at 1481-2 [Ames].

¹² Robert Enright, "She's known for stirring up controversy. But when Diane Thorneycroft sketched a murdered Mickey and Big Bird in bondage, it appeared she'd gone a bit too far" *The Globe and Mail* (31 July 2002) R1 [Enright].

stabbed him in the chest, and a pool of blood collects beneath him. In showing these familiar pop cultural characters in this way, Thorneycroft is seeking to comment on the way in which violence is portrayed in the media, particularly in television programs which target younger audiences. The audience is challenged to view each character differently as opposed to its original context on television.

Compared to other artistic mediums in which appropriation practices are used, appropriation in visual art is the most powerful and effective medium for questioning societal norms because of its non-verbal aspect.¹³ Each individual viewer who interprets Thorneycroft's violently anomalous sketches is free to interpret them personally, to make his or her own meaning out of what is conveyed. The interpretation also works on a collective level since the source material, here being personalities that often enter our living rooms, are part of our broader social consciousness:

This ability to function on several different levels at once is not unique to visual arts, but, because images are more open to individual interpretation than verbal forms are the visual arts are more widely suited to conveying a message of social criticism to many viewers while stimulating the individual viewer to articulate her particular understanding of the message itself.¹⁴

However, because of this visual aspect, appropriation practices in visual art pose the greatest challenge to copyright law compared to literary or digital music sampling. A writer can make discrete selections from the original source material in order to draw the needed reference. This is not the case with the visual arts, where the artist will almost always require the entire original work to make a sufficient reference for with which viewers will associate.¹⁵

Beyond challenging the social norms represented by the original work, the particular act of appropriating the original work conveys a powerful message.

¹³ *Ames, supra* note 11 at 1482.

¹⁴ *Ibid.* at 1483.

¹⁵ See generally *supra* note 11.

In this way, appropriation art is part of a broader postmodern movement that seeks to confront the very notions of originality and authorship that are fundamental to the copyright law system. Appropriation art can thus be seen as a discursive practice that challenges the process of creation and innovation, and the Lockean assumptions that often serve to justify the rights conferred upon authors. By using the primary work as raw material in the secondary work, appropriation artists undermine the romantic view of the author as an individual creative genius; it is a statement that the author does not create in a vacuum.

In “The Author Effect after the ‘Death of the Author’: Copyright in a Post-modern Movement”, Elton Fukumoto traces the idea of the author alongside the Lockean approach to individual property. He describes the romantic notion of the author as the idea that the author is “an individual who is solely responsible – and therefore exclusively deserving of credit – for the production of the new work”.¹⁶ The concept of authorship coincides with Lockean justifications for the conferral of property rights. Lockean natural rights theory posits that one should reap the benefits of his labour.¹⁷ Applied to copyright, the theory would attribute the author as the sole source of creativity and originality, and therefore deserved of the rights to his intellectual works to the exclusion of others. The act of appropriating is a direct challenge against the assumptions of authorship; it is a clear statement of defiance, asserting the artistic and creative process is necessarily a collective process that draws on the ideas and works of others.¹⁸

In calling his studio the ‘Factory’, pop-artist Andy Warhol was said to be commenting on the different perspectives and ideas that make up the process

¹⁶ *Fukumoto, supra* note 6 at 906.

¹⁷ See especially Carys J. Craig, “Locke, Labour & Limiting the Authors’ Rights: A Warning Against a Lockean Approach to Copyright Law” (2002) 28 *Queen’s L.J.* 1 at para 2. Craig argues “the deontological explanation for copyright law framed in Lockean natural rights rhetoric and, and loaded with presumptions of moral entitlement, inevitably distort rather than facilitate a nuanced understanding of the copyright system”.

¹⁸ See generally Jessica Litman, “The Public Domain” (1990) 20 *Emory L.J.* 965 at 1019. “Originality is a conceit, but we like it. To the extent that we are tempted to forget that originality is a conceit, it can be a dangerous principle on which to base a property system”.

of art. Warhol's multi-screen images of Marilyn Monroe, Elvis Presley, and Jackie Onassis made him a household name in American popular culture. Numerous artisans were involved in the creation of his pieces: one artist would create a silkscreen print of an image selected by Warhol, and other artists were involved in carrying the work to its completion. Art historians have often viewed Warhol's collaborative 'Factory' as an emphasis that the artistic process is ultimately communal rather than individual.¹⁹ With this view in mind, a Lockean approach to authorship is turned on its head. Every contributor to the final product would deserve a property interest in the final product. Appropriation art can thus be seen as a discursive attempt to broaden the public domain and widen the ambit of expressions and intellectual works for society to flourish:

A technique of critical discourse appropriation defies the very structure that copyright serves to protect. It is manifest a rejection of private property in favour of a more communitarian conception of society. Therefore, the act of appropriation itself imparts a political message; it reveals that society (and its legal system) is laden with assumptions that financial incentives promote individual creativity, and that property interests supersede society's right of access to information.²⁰

Seen in this way, appropriation art can stand in direct opposition to the purposes of copyright. However, as the following jurisprudence will show, this relationship largely depends on the accepted underlying objectives of a given copyright regime. The Canadian copyright regime that has, until recently, taken on a more natural-rights-based objective maintains the opposition; an incentive-based system such as that of the United States aligns the valuable artistic expressions of appropriation art with the fundamental public purpose of copyright.

¹⁹ Patricia A. Krieg, "Copyright, Free Speech, and the Visual Arts" (1983) 93 Yale L.J. 1565 at 1579.

²⁰ *Ibid.* at 1578.

PART II – THE CURRENT JURISPRUDENCE ON APPROPRIATION PRACTICES

A. The Canadian Fair Dealing Exception

The current jurisprudence in respect to parody in Canada does not bode well for appropriation practices. On the surface it could be argued there is lack of certainty in the case law. However, a close examination of the Canadian *Copyright Act* makes it clear that recontextualized works such as those of Thorneycroft's plainly run afoul of the copyright owner's monopoly, and would not be justified under the very narrow fair dealing provisions as they currently stand.

The fair dealing exceptions under section 29 allow use of copyrighted works which would otherwise be an infringement,²¹ regardless of whether or not a license was available. To qualify under fair dealing, the would-be infringer must demonstrate that (1) the dealing is for the purposes of private study, research, criticism or news reporting; (2) the dealing is fair; and (3) the source is mentioned with the name of the author. The statute itself does not define what constitutes 'fair', leaving this determination to develop through judicial precedence. It should be noted that the list of fair dealing purposes is an exhaustive list; therefore, a given dealing that is in fact 'fair' will not qualify under the fair dealing exception if it is not for the purpose of research, criticism or news reporting.

To date, the leading Canadian case in respect to parody under the fair dealing exception is the Federal Court decision of *Michelin*. In 1994, the defendant union tried to organize a bargaining unit for three Michelin manufacturing plants in Nova Scotia. In an attempt to rally support, the union distributed

²¹ First the copyright holder must show the defendant has infringed his copyright in a work. This demonstration requires that the copyright owner prove (1) the defendant had access to the original work and (2) the infringing work is 'substantially similar' to the copyrighted work. *Caron Association des Pompiers de Montreal* (1992), 42 C.P.R. (3d) 292 (F.C.T.D.).

leaflets that depicted a rendition of Michelin's mascot, *Bibendum*, in a way that ridiculed the employer's management tactics. For instance, one drawing showed a Michelin employee about to be crushed under the heels of an ominous *Bibendum*. Michelin immediately brought suit, alleging the union's use of *Bibendum* was an infringement of its copyright.²² Justice Teitelbaum did not hesitate in finding the union had reproduced a substantial part of Michelin's *Bibendum* design.²³ This finding does not come as a surprise, seeing as a successful parody must refer the viewer to the original work. The union raised two arguments in its defence: firstly, that their use of *Bibendum* was justified under fair dealing, and in the alternative, that their inability to use *Bibendum* was a violation of their freedom of expression right under section 2(b) of the *Charter*.²⁴

The union's claim that its use of *Bibendum* was justified under the fair dealing exception was strictly rejected. Firstly, Justice Teitelbaum made it clear that the union's parodic use failed to meet the requirements of criticism within the meaning of section 29: "Under the *Copyright Act*, 'criticism' is not synonymous with parody. Criticism requires analysis and judgment of a work that sheds light on the original".²⁵ Furthermore, a reading of the *Copyright Act* meant that the purposes enumerated under section 29 was an exhaustive list, barring the Court from reading in parody as a new exception on its own right. Justice Teitelbaum explained it was not within the Court's role to read in parody as an included fair dealing exception, because such an inclusion was solely within Parliament's authority.²⁶ Thus, the fair dealing analysis was truncated by a failure to fit the union's use within the purposes of section 29, largely due to the narrowly defined exceptions that do not include parody.

To fully understanding the Court's reasoning in *Michelin* it is integral to note that at the time of the decision, the sole purpose of Canadian copyright law

²² *Michelin*, *supra* note 10 at 73.

²³ *Michelin*, *supra* note 10 at 55.

²⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

²⁵ *Michelin*, *supra* note 10 at 66.

²⁶ *Ibid.* at para. 68: "exceptions to copyright infringement should be strictly interpreted. I am not prepared to read in parody as a form of criticism and thus create a new exception under section 27(2)(a.1)".

was to convey a just reward to the author. The purpose of the Canadian copyright regime is not stated explicitly in the statute, leaving it up to the judiciary to respond through evolving case law. At the time of *Michelin*, the jurisprudence did not recognize the furthering of the public interest as a policy objective; any concept of weighing the author's monopoly with a public benefit was not in the Court's mindset. Justice Teitelbaum followed the earlier decision of *Bishop v. Stephens*,²⁷ and held that the express purpose of Canadian copyright is "the protection of authors and ensuring that they are recompensed for their creative energies and works".²⁸ The Court's narrow approach to fair dealing, its lack of principled reasoning in favour for technical requirements flows directly from this sole purpose. This natural-rights, Lockean-based interpretation yields an extremely restrictive approach to fair dealing. It also yields values of moral entitlement, which materialized in Justice Teitelbaum's obvious distaste for the union's use of *Bibendum* in their organizing pamphlets.²⁹

Given the narrowly-defined sole purpose of copyright, a dismissal of the union's freedom of expression argument effortlessly followed. Applying the test set out in *Irwin Toy Ltd. v. Quebec (A.G.)*³⁰ the union's adaptation of *Bibendum* was an example of expression. In other words, the pamphlets met the low threshold of "attempt[ing] to convey meaning".³¹ However, Justice Teitelbaum was adamant in concluding that the union's expression incorporating *Bibendum* was a prohibited form of expression within the meaning of section 2(b) because one cannot use another's property to assert a freedom of expression right:

²⁷ [1990] 2 S.C.R. 467 at 473-474. See also *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at 373.

²⁸ *Michelin*, *supra* note 10 at 115.

²⁹ "Since the Defendants have shown little creativity in depicting the "Bibendum", I do not accept the Defendants' contention that their creativity is being fatally stifled by a repressive copyright regime." *Ibid.* at para. 76; "To accept the Defendant's submission on parody [as fair dealing] would be akin to making the parody label the last refuge of the scoundrel..." *Ibid.* at para. 75.

³⁰ [1989] 1 S.C.R. 927.

³¹ *Ibid.* at para. 91.

The freedom guaranteed by the *Charter* is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. *It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter and use a public building for such purposes.*³²

Since there had not been any intellectual property cases dealing with the issue of freedom of expression, Justice Teitelbaum relied upon real property cases to draw an analogy. The pre-*Charter* decision of *Harrison v. Carswell*³³ was referred to, where the defendant was unsuccessful in arguing that her freedom of expression right included the right to picket on the plaintiff's property.

Had the union been successful in establishing a section 2(b) freedom of expression violation, the Court ruled that this violation would have been demonstrably justified pursuant to the *Oakes* test under section 1 of the *Charter*.³⁴ It had already been well-established that the purpose of Canadian copyright was solely to reward the author. Justice Teitelbaum's section 1 analysis that followed was a direct outcome of this sole purpose. Because the Court found "the protection of authors and ensuring that they are recompensed for their creative energies and works is an important value in a democratic society in and of itself",³⁵ the union had no chance of succeeding under the *Charter* challenge. As Carys Craig explains, "[h]aving identified the ultimate purpose of the *Copyright Act* as the protection of authors – and not, say, the public interest in encouraging creativity and the dissemination of intellectual works – the Court could hardly avoid the conclusion that

³² *Ibid.* at para. 96 [emphasis added].

³³ (1975), 62 D.L.R. (3d) 68.

³⁴ *R. v. Oakes* [1986] 1 S.C.R. 103 at 138-139. Once the claimant successfully establishes a prima facie *Charter* infringement, the onus shifts to the government actor to show the infringement is nonetheless justified in a fair and democratic society: The test asks (1) Whether there is a *pressing and substantial objective* and (2) whether the means chosen are proportional to this objective.

³⁵ *Michelin*, *supra* note 10 at 115.

enforcing the author's monopoly is a rational and efficient means of achieving that purpose".³⁶

As the law currently stands after *Michelin*, the only way for an appropriation artist to escape liability under the *Copyright Act* is either to obtain a license from the copyright holder or to avoid a finding of infringement altogether by not reproducing a substantial portion of the original work. The facts in *Michelin* demonstrate the sheer impossibility of a licensing agreement. Undoubtedly, Michelin would not have conferred a license to the union allowing it to ridicule *Bibendum*, and to further its collective organizing objectives. Legal scholars have strongly criticized that *Michelin* effectively allows the copyright holder to exercise their right as a form of private censorship.³⁷

Moreover, the second option, that of avoiding a *prima facie* finding of infringement, is in actuality a non-option as far as a successful appropriation work is concerned. As critics of *Michelin* have argued, a parody that does not substantially copy the criticized work so that the original is recognizable is not a successful parody.³⁸ Parody, and appropriation works in general require that the viewer associate with the original work for the commentary to have its effect. For example, in an earlier collection of drawings and photographs entitled *Foul Play*, Thorneycroft depicted well-known children's cartoon characters being hung and massacred.³⁹ Her objective was to comment on the hypocritical way in which society views violence – that violence is largely acceptable in child's play. After a warning from a lawyer who sat on the gallery board of directors, Thorneycroft decided to substitute copyrighted characters with generic toys, while altering other characters so they were

³⁶ Carys J. Craig, "Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright" (2006) 56 U.T.L.J. 75 at 91.

³⁷ See especially David Fewer, "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 U. Toronto Fac. L. Rev. 175 at 197.

³⁸ See Gregor P. Binkley "The Judicial Treatment of Fair Dealing and Freedom of Expression in *Michelin v. C.A.W.*" (2000) 17 C.I.P.R. 225; Jane Bailey, "Deflating the Michelin Man: Protecting Users' Rights in the Canadian Copyright Reform Process" in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 125.

³⁹ *Enright, supra* note 12.

no longer recognizable. This had a compromising effect on her intended commentary because the viewer could not properly associate with the reference:

I did a drawing of a snowman that died of massive head injuries and it just isn't the same thing as Goofy dying of massive head injuries. We know how Goofy walks and talks, and we can hear him in our heads, whereas the snowman doesn't have a history. I can't tell you how disappointed I am.⁴⁰

B. The American Fair Use Doctrine

Compared to the Canadian *Copyright Act*, the purpose of American copyright is directly stated in a constitutional directive: "To promote the Progress of Science and useful Arts, *by* securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".⁴¹

The cornerstone of the American copyright system is based upon an incentive theory; copyright is meant to reward a monopoly right to authors *in so far as* it provides an incentive for authors to create and contribute to the overall objective. Although scholars have often used the rhetoric of the dual objectives of copyright, the constitutional directive explicitly recognizes that in the end, the public interest is the primary objective:

It should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to use one's expression, copyright supplies the economic incentive to create and disseminate ideas.⁴²

The different approach to fair use in the American jurisprudence compared to the Canadian approach in *Michelin* flows directly from the fundamentally different purposes of the respective copyright regimes.

⁴⁰ Thorneycroft, cited in *Enright*, *supra* note 12.

⁴¹ *U.S. Const.* art. I, §8, cl.8 [emphasis added].

⁴² *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539 at 539.

Once the copyright holder has established an infringement, the fair use doctrine allows the alleged infringer to nonetheless justify the use if it is seen as 'fair' and for purposes including criticism, comment, news reporting or teaching. §107 then goes on to list a number of non-exhaustive factors a court should consider in determining whether the use is fair. A determination of fair use requires a case by case analysis, considering these four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴³

Since copyright confers an economic reward to authors, there is no real justification for limiting uses of the copyrighted work that do not harm the author's economic interest under this incentive-based system.⁴⁴ The fair use doctrine can thus be seen as a way to allow for uses of copyright works to ensure that the author's economic reward does not impair the ultimate objective of public benefit. Because the list of fair use examples is not exhaustive, a purpose that does not fit neatly under the enumerated examples may still be justifiable if the use is 'fair'.

A determination under the fair use doctrine necessitates that the courts undergo a balancing of interests. Using the four factors, a judge will weigh the impairment to the author's economic interest compared to the public

⁴³ *US Copyright Act*, U.S.C. tit. 17 §107 (1976).

⁴⁴ For a discussion on the economic implications of appropriation art, see generally William M. Landes, "Copyright, Borrowed Images, and Appropriation Art: An Economic Approach" (2000) 9 *Geo. Mason L. Rev.* 1.

benefit of access, keeping in mind that the public interest is the ultimate goal of copyright.⁴⁵ Because the fair use doctrine is so flexible, it allows the courts to consider the underlying copyright objective of promoting the public interest: “Courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in development of art.”⁴⁶ This flexibility was intended by the framers of the American *Copyright Act* to enable the judiciary to adapt the fair use doctrine to new fact situations and technologies.⁴⁷

American courts have welcomed parody as a valid purpose under the fair use doctrine and have been generally willing to recognize parody as a viable art forum. *Irving Berlin et al. v. E.C. Publications, Inc.* was the first American case to recognize parody as a justifiable purpose under the fair use defence: “[A]s a general proposition, we believe that parody and satire are deserving of substantial freedom – both as entertainment and as a form of social and literary criticism”.⁴⁸ The courts have also sought to protect parody because of the practical reason that a copyright holder will unlikely license a work to be subject to ridicule or criticism, even if this criticism were to serve a greater public good.⁴⁹ Despite the inclusion of parody under the fair use doctrine, the first appropriation art case to make its way into the courts did not side so favourably in the public interest.⁵⁰ *Rogers v. Koons* showed that although purposes of parody could be equated with fair use, appropriation practices didn’t necessarily fit within the paradigm of parody.⁵¹

⁴⁵ *Schaumann*, *supra* note 5 at 264.

⁴⁶ *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 at 307 (2d. Cir. 1966).

⁴⁷ *Ames*, *supra* note 11 at 1489.

⁴⁸ 329 F.2d 541 at 545 (2d Cir. 1964).

⁴⁹ See *Fisher v. Dees* 794 F.3d 432 at 437 (9th Circ. 1986).

⁵⁰ Although Koons was the first appropriation art case to end up in the courts, he was not the first artist threatened with legal sanctions in respect to re-contextualizing a copyrighted work. For example, Warhol paid an out of court settlement of \$6,000 for his use of Patricia Caulfield’s photographs in his silk screen prints ‘Flowers’. See *supra* note 11 at 1484.

⁵¹ 960 F.2d 301 (2d Cir. 1992) [*Rogers*].

1. *Rogers v. Koons*

California photographer Art Rogers brought suit against contemporary artist Jeff Koons, alleging Koons' *String of Puppies* sculpture infringed the copyright of his 1980 *Puppies* photograph. Koons' sculpture was part of the *Banality Show*, exhibited at New York's Sonnabend Gallery in 1988. In fact, Koons modeled his larger than life sculpture after a postcard of Rogers' photograph that he had bought in 1987 at an airport gift shop. Rogers' photograph was a shot of a couple holding puppies on a park bench. Koons included a number of modifications to Rogers' work. Koons' sculpture was entirely blue, included changes to the couples' facial expressions and depicted the couple with flowers in their hair.⁵² Koons claimed his purpose of using Rogers' photo was to comment on the works lack of creativity – that Rogers' work was a typical, generic photograph and as such perfect fodder for his *Banality Show*: “It was only a postcard photo and I gave it spirituality, animation and took it to another vocabulary”.⁵³

In reasoning that Koons' use was not ‘fair’, the Court focused on the technical requirement of parody and emphasized that a parody must criticize the original work.⁵⁴ Whether Koons' sculpture furthered the purposes of copyright was of little importance in the Court's reasoning. As one commentator remarks, “[b]y not addressing the critical purpose of the work, its importance as an example of kitsch and its place in art history and postmodernism the Court neatly sidestepped any real understanding of the work itself”.⁵⁵ Even more, the decision is noticeably laced with the Court's value judgement of Koons' artistic merit.⁵⁶ However, the Court's approach in *Rogers* comes as no surprise since it was the first time an American court had to grapple with the emerging practices of postmodern art. In the seminal decision of *Campbell v. Acuff-Rose Music Inc.* that followed, the United States Supreme Court made a marked turn towards accepting appropriation

⁵² *Ibid.* at 304-305.

⁵³ Koons, cited in Lynne A. Greenberg, “The Art of Appropriation: Puppies, Piracy, and Post-Modernism” (1992) 11 Cardozo Arts & Ent. L.J. 1 at 23 [Greenberg].

⁵⁴ *Rogers*, *supra* note 51 at 310.

⁵⁵ *Greenberg*, *supra* note 53 at 29-30.

⁵⁶ See *ibid.* at 303-305 where the Court describes Koons as a former Wall Street Broker having no skill in drawing or sculpting. In comparison, the Court notes the numerous galleries where Rogers's work has been displayed.

practices.⁵⁷ The Court's reasoning showed that the fair use doctrine is capable of accommodating appropriation as a valid art form.

2. *Campbell v. Acuff-Rose Music*

In *Campbell*, the United States Supreme Court ruled that 2Live Crew's commercial rap parody of Roy Orbison's "O, Pretty Woman" was justified as fair use. It was emphasized that all of the four fair use factors should be weighed and considered together; not one factor is determinative of the issue. Therefore, the courts below erred in barring the defence of fair use merely on the basis that the song was a commercial parody.⁵⁸ *Campbell* is integral to fitting appropriation practices within the framework of copyright, firstly because it introduced the 'transformative use' test to a determination of fair use, and secondly because it recognized that parody requires the use of pre-existing material to comment on the original work and that this use was justifiable due to the social value of parody. The Court adopted Justice Leval's proposed test for transformative use, which asks, "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks it in other words, whether and to what extent the new work is transformative".⁵⁹ Applying the test to the facts of the case, the Court found that 2 Live Crew's song, in juxtaposing "the romantic musings of a man whose fantasy comes true with degrading taunts and a bawdy demand for sex"⁶⁰ was transformative.

The issue of transformativeness is meant to colour the entire fair use analysis. The Court emphasized that the more transformative the work's purpose, the less important the other three factors are against a finding of fair use.⁶¹ For example, the third factor, the amount and substantiality of the original work used, is often seen as the largest hurdle for a re-contextualized work under the fair use analysis. However, the transformative use test adopted in *Campbell* dictates that the amount used depends on the transformative

⁵⁷ 510 U.S. 569 (1994) [*Campbell*].

⁵⁸ *Ibid.* at para. 10.

⁵⁹ Leval, *supra* note 9 at 1111.

⁶⁰ *Campbell*, *supra* note 57 at 17.

⁶¹ *Ibid.* at para.11.

character and purpose of the use. Justice Souter wrote, “[w]hen parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of the original to make the object of its critical wit recognizable”.⁶² Transformative use also accords with the fourth factor, the effect of the use on the original’s market. If a work is truly transformative, if it adds new meaning to the original, it will necessarily serve a different purpose compared to the original work. In that way, it is unlikely that the parody will serve as a market substitute for the original. Assuming the given parody is in fact transformative, since parody and the parodied work serve different functions the parody will unlikely pose a commercial threat to the original’s market.⁶³

In taking a principled approach to fair use, *Campbell* can be seen as a landmark case for opening up the possibility for appropriation art to flourish under the American copyright regime. Justice Souter wrote,

[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.⁶⁴

As a critical art form that seeks to challenge social norms, the goal of appropriation art is necessarily to add new meaning that is totally different than the original work. Although it was not based on a visual artwork, cases that followed *Campbell* have shown its groundbreaking precedence in paving the way for the recognition of appropriation practices as not only a valid art form; it recognized appropriation techniques as an expressive practice that actually furthers the objectives of American copyright.

⁶² *Ibid.* at para. 25.

⁶³ See Nicholas B. Lewis, “Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-contextualized Forms of Music and Art?” (2005) *Am. U. L. Rev.* 267 at 276-277 [Lewis].

⁶⁴ *Campbell*, *supra* note 57 at 11.

Despite the progressive step taken by the Court in *Campbell*, proponents of appropriation practices were not entirely satisfied with the decision because it was not based on visual work, but on lyrics as a literary work. In respect to the amount of the original work used, the Court stated that the secondary artist can “conjure up’ at least enough of the original to make the object of its critical wit recognizable”.⁶⁵ Commentators were concerned that this threshold suits the purposes of literary works, but is inadequate in accommodating visual artists who often use the entire original work to make an adequate reference:

This factor probably presents the largest obstacle to finding that a re-contextualized work constitutes fair use based on the quantitatively large amount of copyright material that will generally be used. ...[I]f courts are willing to accept re-contextualization as a valid transformative purpose because it is a common post-modern form of expression, then courts must be more lenient about allowing artists to use as much as is necessary to successfully convey their intended expressions.⁶⁶

Because *Campbell* was based on a literary work, the Court does not explicitly state that an appropriation artist may lawfully use a copyrighted work in its entirety. However, the following case of *Mattel v. Walking Mountain* settled this issue.

3. *Mattel v. Walking Mountain*

The impact of *Campbell* on the legal validity of appropriation practices was fully realized years later in the 2002 decision of *Mattel v. Walking Mountain Productions*.⁶⁷ In 1999 Mattel brought suit against photographer Tom Forsythe in respect to his series of works entitled *Food Chain Barbie*. In the 78 photo series, Forsythe depicts nude Barbie dolls being attacked by vintage appliances. For instance, in the photograph *Mellow Yellow*, Forsythe shows a naked Barbie doll spinning on a vintage Kenmore rotisserie. The doll is

⁶⁵ *Ibid.* at para. 25.

⁶⁶ *Lewis, supra* note 63 at 295-296.

⁶⁷ *Mattel, supra* note 7.

still wide-eyed and smiling, gleaming under the yellowish orange oven light. Another photograph entitled *Fondue for Three* portrays three Barbie heads floating in a fondue pot, each head being pierced by a fondue fork.⁶⁸ On August 22, 2001, the Court granted Forsythe's motion for summary judgment, holding his depictions of Mattel's Barbie constituted fair use. Not only was Mattel unsuccessful on appeal; the Court confirmed an order requiring that Mattel pay Forsythe \$2 million in attorney client fees, showing its disdain for Mattel's action which it found groundless and unreasonable.⁶⁹

The Court was not hesitant in finding that Forsythe's use of the Barbie dolls was fair use, as evidenced by the granting of summary judgment. Aided by expert testimony from aesthetic scholars, the Court accepted Forsythe was commenting on the gender roles in society and the effect Barbie has had in shaping our social norms. In this way, Forsythe gave a whole new context for viewers to associate with Barbie in a different way, giving the dolls an entirely new meaning.⁷⁰ In *Food Chain Barbie* a viewer's understanding of Barbie as a household icon is transformed. The Court describes Forsythe's message as a "critique [of] the objectification of women associated with 'Barbie' and to lambaste the conventional beauty myth and the societal acceptance of women as objects because that is what Barbie embodies".⁷¹

The decision goes to great lengths to emphasize that the artistic merit of Forsythe's work is of no relevance under the fair use analysis. Instead, the Court relied heavily on Justice Holmes's often cited dictum in *Bleistein*: "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work]".⁷² It was of no concern whether or not Forsythe's work was in good or bad taste. Mattel tried to introduce evidence to show that the general public did not view

⁶⁸ Tom Forsythe, "Food Chain Barbie, R Prints, Edition of 450", online: Tom Forsythe Artsurdism, <http://creativecommons.org/Results.cfm?category=6>.

⁶⁹ *Mattel*, *supra* note 7.

⁷⁰ "I put them in a blender, with the implication they're going to get chewed up, but no matter what, they just keep smiling. That became an interesting commentary on just how false the image is". Forsythe, cited in Kembrew McLeod, *Freedom of Expression*®, (New York: Doubleday 2005) at 143.

⁷¹ *Mattel*, *supra* note 7.

⁷² *Bleistein*, *supra* note 2.

Forsythe's photographs as parody. It had taken surveys at various shopping malls, gauging people's reactions after being shown Forsythe's works. This survey evidence was frowned upon by the Court: "Use of surveys in assessing parody would allow majorities to determine the parodic nature of a work and possibly silence artistic creativity. Allowing majorities to determine whether a work is parody would be greatly at odds with the purpose of the fair use exception".⁷³ Indeed, the Court was careful to heed the warnings of Justice Holmes; the reasoning is not coloured by opinions as to artistic merit, compared to the earlier case of *Rogers*.

Perhaps the greatest strength of the Court's reasoning was its recognition that the third fair use factor, the amount and substantiality of the portion used, poses a unique obstacle for visual appropriation art. Here, the Court noted, "[b]ecause the copyright material is a doll design and the infringing work is a photograph containing the doll, Forsythe, short of severing the doll, must add to it by creating a context around it and capturing the context in the photograph".⁷⁴ It found that the particular visual medium used by Forsythe required the use of the entire Barbie doll. Furthermore, Mattel's argument that Forsythe exceeded the necessary amount was strictly rejected: "We do not require parodic works to take the absolute minimum amount of the copyrighted work possible."⁷⁵ The Court was merely applying the transformative use test as set in *Campbell* to a visual work – that the amount of the original work used depends on the character of the use, the character in this case being a visual work. This settled the uncertainty left after *Campbell*. It was a clear affirmation that an appropriation artist who adopts the entire copyrighted work in order to make a successful reference is not necessarily barred from relying on the fair use defence.⁷⁶

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ See *supra* note 57 at 587 where the Court notes, "once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the [work's] overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original."

Throughout the Court's reasoning, it is evident that the overall purpose of promoting public access to intellectual works is a guiding concern. Even more, the Court is not hesitant to incorporate free speech values into its analysis of fair use and cautions that allowing Mattel's claim would be effectively allowing private censorship:

The public benefit in allowing artistic creativity and social criticism to flourish is great...No doubt, Mattel would be less likely to grant a license to an artist that intends to create art that criticises and reflects negatively on Barbie's image. It is not in the public's interest to allow Mattel complete control over the kinds of artistic works that use Barbie as a reference for criticism and comment.⁷⁷

This decision is an unmistakable confirmation by the American courts that commercial and pop cultural images can be lawfully appropriated so long as the use is fair, bearing in mind their transformative use. It also shows that in its application, the transformative use test is a useful, flexible measure that allows the courts to be mindful of the public purpose objective of copyright law rather than being preoccupied with technicalities.

4. *Blanch v. Koons*

The recent American decision dealing with appropriation art, *Blanch v. Koons*, offers the most promising reasoning in favour of accommodating appropriation art under copyright law.⁷⁸ In 2005, photographer Andrea Blanch filed suit against Koons for violating her copyright in a photograph she had taken that appeared in *Allure* magazine.⁷⁹ Koons scanned the photo *Silk Sandals*, took out the background, and superimposed the image on an inverted slant onto his *Niagara* painting. *Niagara* was commissioned in 2000 by Deutsche Bank and the Guggenheim Foundation as part of a seven painting series called *Easyfun-Ethereal*. The painting shows four pairs of women's feet dangling over images of desserts and treats, with the waterfall as a backdrop. In a court filing, Koons' lawyer John Koegel wrote, "[Niagara]

⁷⁷ *Mattel*, *supra* note 7.

⁷⁸ No. 05-6433 (2nd Circuit, October 26, 2006) [*Blanch*].

⁷⁹ 396 F. Supp 2d 476 (S.D.N.Y. 2005).

is an entirely new artistic work...that comments on and celebrates society's appetites and indulgences as reflected in and encouraged by a ubiquitous barrage of advertising and promotional images of food, entertainment, fashion and beauty".⁸⁰

The Court's reasoning in *Blanch* is yet another encouraging step towards the validity of appropriation art under the American copyright regime. It picks up on the principles set out *Campbell*, showing that the transformative use is capable of accommodating appropriation when applied flexibly and guided by the overall public purpose of copyright. In assessing the transformativeness of Koons' use, Justice Sack compared the purpose of Koons' use with that of Blanch's photograph. For instance, Koons testified, "I want the viewer to think about his or her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives",⁸¹ and "by recontextualizing these fragments as I do, I try to compel the viewer to break out of the conventional way of experiencing a particular appetite as mediated by mass media".⁸² When viewed alongside Blanch's purpose in her photograph, it is clear that the two works are totally divergent: "I wanted to show some sort of erotic sense to get more of a sexuality to the photographs"⁸³. Judge Sack did not hesitate in finding *Niagara* was a transformative use of Blanch's photograph. The testimony of the two artists readily showed Koons' work as adding insight and new understanding to Blanch's original work. Because appropriation art has an underlying purpose of critiquing the source material that is recast, it will likely satisfy the comparing purpose analysis exemplified in this case.

Perhaps the strongest arsenal this decision provides appropriation artist is the Court's disregard for the technical requirements of parody as set out in *Rogers*. The Court in *Rogers* was adamant that in order for a work to qualify as a parody "the copied work must be, at least in part, an object of the

⁸⁰ "Koons Wins Copyright Lawsuit" Artnet News (19 January 2006), online: artnet Magazine, <http://www.artnet.com/magazineus/news/artnetnews/artnetnews1-19-06.asp>.

⁸¹ *Blanch*, *supra* note 78 at 17.

⁸² *Ibid.* at 5-6.

⁸³ *Ibid.* at 17

parody”.⁸⁴ This requirement did not preclude the Court from a finding of fair use in this instance. That *Niagara* did not comment on Blanch’s photograph *per se* did not pose as a technical obstacle against Koon’s defence because the Court found *Niagara* fell under the heading of satire. As the list of purposes under §107 is not exhaustive, parody is not the only classification on which an artist can rely upon for a defence of fair use. Rather than requiring that the secondary work critique the primary work, satire “can stand on its own two feet and so requires *justification for the very act of borrowing*”.⁸⁵

The adopted test for satire is much broader than that of parody, and asks “whether Koons had a genuine creative rationale for borrowing Blanch’s image rather than merely to get attention or to avoid the drudgery of coming up with something fresh”.⁸⁶ This justification requirement may appear to be an onerous threshold, but the Court’s reasoning shows that in respect to artistic expression it is a very realistic threshold to meet. Again, quoting the words of Justice Holmes from *Bleistein*, Judge Sack explained that it is not within the Court’s role or expertise to judge the merits of Koons’ artistry or his painting: “[I]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of a work, outside the narrowest and most obvious limits”.⁸⁷

The Court in *Niagara* is less concerned with pigeon-holing requirements, and more concerned with using the transformative use test as a flexible tool to further the public interest purpose of American copyright law. Judge Sack was careful not to undergo a quality assessment of whether *Niagara* was a work of art and, instead, gave considerable weight to Koons’ explanation for his choice in referencing *Silk Sandals*:

Although the legs in ‘Silk Sandals’ might seem prosaic,
I considered them to be necessary for inclusion in my
painting rather than legs I might have photographed
myself... To me, the legs depicted in the Allure photograph

⁸⁴ *Rogers*, *supra* note 51 at 310.

⁸⁵ *Blanch*, *supra* note 78 at 23 [emphasis added].

⁸⁶ *Ibid* at 24.

⁸⁷ *Bleistein*, *supra* note 2 at 251.

are a fact in the world, something that everyone experiences constantly...By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine.⁸⁸

Judge Sack wrote, “[i]t seems clear enough to us that Koons’ use of a slick fashion photograph allows him to satirize life as it appears when seen through the prism of slick fashion photography”.⁸⁹

The validity of appropriation art under the American copyright regime has clearly evolved from the rigid stance taken in the first case of *Rogers*. Since *Campbell* introduced Justice Leval’s transformative consideration to the fair use analysis, it has provided a useful tool that allows the courts to be guided by the ultimate public purpose of American copyright. If a work is transformative, if it “adds something new, with a further purpose or different character,”⁹⁰ society would surely benefit from its added value and meaning. Furthermore, the jurisprudence shows the American courts are more willing to take on a principled approach to fair use, focusing on the dissemination of works to further the purpose of copyright rather than fixating over technicalities and strict definitions. Regardless of whether the secondary work mimics the primary work, the work will still be open to a fair use defence under a broader heading of satire. An artist who faces the difficult judgement call as to whether or not he or she should adopt a reference to a copyrighted work can find comfort in the courts’ growing acceptance of this postmodern artistic practice. While the situation in America has moved progressively towards a more user-friendly approach, *Michelin* is still the leading case law in Canada. As it currently stands, the Canadian jurisprudence is even more restrictive than *Rogers*; and Canadian artists have little to find comfort in.

⁸⁸ Koons cited in *supra* note 78 at 24.

⁸⁹ *Ibid* at 24.

⁹⁰ *Campbell*, *supra* note 57 at 11.

PART III: AVENUES OF REFORM – TOWARDS AN ARTIST-FRIENDLY STANDARD

It has been over ten years since *Michelin* silenced any chance of a judicially-imposed parody exemption under Canadian fair dealing. Recent decisions by the Supreme Court of Canada give reason to believe that *Michelin* would be decided much differently by the courts today, regardless of any parliamentary reform to the current fair dealing provisions. It could be strongly argued that Canadian courts would approach an appropriation art fact situation such as *Michelin* very differently. Firstly, several legal scholars have convincingly argued that the Federal Court erred in its freedom of expression analysis in *Michelin*. Also, in light of the recent turn in Canadian copyright pioneered by the Supreme Court of Canada in the groundbreaking decisions of *Théberge v. Galerie d'Art du Petit Champlain Inc.*⁹¹ and *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁹² there is good reason to reconsider the judicial authority of *Michelin*. However, despite the recent turn by the Supreme Court of Canada, the following analysis will show that the most viable solution for appropriation artists is through parliamentary reform.

Did the Court Err in Michelin?

Legal scholars have been quick to condemn the Court's section 2(b) *Charter* analysis in *Michelin*, primarily because of the ease to which the Court dismisses the union's claim. In particular, it has been strongly argued that the Court failed to fully appreciate the conceptual difference between real property and intellectual property rights. In "Deflating the Michelin Man – Protecting User's Rights in the Canadian Copyright Reform Process", Jane Bailey makes notice of the unique non-rivalrous character of intellectual property rights. Bailey writes, "Unlike real property, however, copyright material is non-rivalrous – your use of my copyrighted material does not preclude me from using it".⁹³ The Court did not come to terms with this distinction. Instead, Justice Teitelbaum quickly silenced any issue, writing,

⁹¹ (2002), 17 C.P.R. (4th) 161 (S.C.C.) [*Théberge*].

⁹² [2002] 1 S.C.R. 339 [*CCH*].

⁹³ *Bailey*, *supra* note 38 at 143.

“just because the [copyright] is intangible, it should not be any less worthy of protection as a full property right”.⁹⁴

Legal scholar Carys Craig also takes issue with the Court’s dismissive stance, paying particular attention to the physical characteristics of real property compared to that of intellectual property. Craig notes that there is nothing inherently expressive about ownership in land. In comparison, with copyrighted works the content that makes up the right is expressive in itself. There is a difference between the physical ownership over a book as property, and its content as a literary, expressive work. Copyrighted works as expressions of ideas are exactly that – they are rights over expression. Craig explains, “[v]iewed in this way, the difference between copyright’s intangible subject matter and the tangible object of, say, land law is fundamentally relevant to determining the limits of copyright in light of freedom of expression values”.⁹⁵

Furthermore, commentators have consistently maintained that the Court in *Michelin* erred in ignoring the constitutional supremacy of the *Charter*.⁹⁶ According to section 52(1) of the *Constitution Act, 1982*, the Constitution, including the *Charter* is the “supreme law of Canada”.⁹⁷ Any law that is inconsistent with the *Charter* is of no force or effect. The Supreme Court of Canada has explicitly held that proprietary interests are not protected under the *Charter*.⁹⁸ Therefore, the employer’s copyright interest did not merit *Charter* protection that would justify overriding the union’s freedom of expression right. By giving the employer’s copyright and, in turn, the *Copyright Act* greater status than a constitutionally enshrined freedom of expression right, the Court in *Michelin* made a serious error that could warrant judicial review. Bailey explains, “foreclosing the protection of certain expression under section 2(b) on the basis that it conflicts with unentrenched property rights directly contradicts the concept of constitutional paramountcy –

⁹⁴ *Michelin*, *supra* note 10 at 103.

⁹⁵ *Craig*, *supra* note 36 at 93.

⁹⁶ See generally *supra* note 37, and *supra* note 36.

⁹⁷ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c. 11, s. 52(1) [*Constitution Act*].

⁹⁸ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at para. 96.

with the unenshrined property right seemingly taking precedence over the enshrined right to free expression”.⁹⁹

The Developments in *Théberge* and *CCH* – New Hope for Appropriation Artists?

In *Théberge*, the Supreme Court of Canada finally settled the longstanding debate in respect to the policy objectives of Canadian copyright. The judiciary, responding to a lack of consensus and clarity within the *Act* itself, rejected the sole purpose objective that had subsisted since the inception of the *Act*. The Court declared that a proper interpretation of the *Copyright Act* reveals the dual purposes of the *Act*:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator... The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature... In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.¹⁰⁰

Proponents of users' rights saw the Court's affirmative statement in *Théberge* as a significant turn in Canadian copyright, a turn that would be realized in the decision of *CCH* that shortly followed.

The Supreme Court of Canada's expansive approach to fair dealing in *CCH* followed logically from the balancing of the public interest and creator's rights. Building on the dual principles established in *Théberge*, the Court adopted a purposive interpretation of the fair dealing provisions, asserting, “The fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence.... The fair dealing exception, like other exceptions in the *Copyright Act*, is a *user's right*. In

⁹⁹ *Bailey*, *supra* note 38 at 142.

¹⁰⁰ *Theberge*, *supra* note 91 at 30-31.

order to maintain a proper balance between the rights of a copyright owner and a users' interests, it must not be interpreted restrictively".¹⁰¹ The Court provided a framework for determining what constitutes 'fair' within the meaning of section 29 that is similar to the four factors set out in §107 of the United States *Copyright Act*. These factors include the purpose of the dealing, the character of the dealing, the amount of dealing, and the effect of dealing on the original work.¹⁰²

Many commentators have rejoiced in the potential impact of the two pioneering decisions. For example, Joliffe, Sartorio and Chenoweth applaud both the dual policy objectives and the expansive approach to fair dealing as "the clearest recognition from a Canadian court that copyright is an instrument of social utility. There are dangers both in overcompensating and undercompensating the intellectual property holder"¹⁰³. The writers note that *CCH* puts Canadian copyright objectives in-line with those set out in the American Constitution. However, while the dual purposes are indeed a move towards the incentive approach, the decision of *Théberge* does not put Canadian copyright objectives at complete parity with American copyright.

Firstly, it should be noted that the ultimate goal of American copyright is the promotion of intellectual works for the public good. The monopoly right conferred to authors is only justified in so far as it provides an incentive to further this overall objective.¹⁰⁴ *Théberge* mandates that author's rights and the public interest are balanced as equal and competing interests. Consequently, Canadian copyright jurisprudence still lacks the understanding of copyright as only a vehicle towards the ultimate public good in having access to creative works. Put simply, copyright should be seen as a means to an end. As Craig argues, "[t]he copyright owner's rights exist only *through* that public interest and cannot be justified in spite of it".¹⁰⁵ For the artist,

¹⁰¹ *C.C.H.*, *supra* note 92 at 48 [emphasis added].

¹⁰² *Ibid.* para 53-60.

¹⁰³ R. Scott Joliffe, Kevin J. Sartorio, & Sarah Chenoweth, "The Dawn of a New Era of Balance in Canadian Copyright Law" (2005) 22 C.I.P.R. 17 at 23.

¹⁰⁴ See Part II, above, for more on this topic.

¹⁰⁵ *Craig*, *supra* note 36 at 111.

this fundamental conceptual difference will impede a full appreciation of appropriation practices by Canadian courts. Teresa Scassa warns that the Supreme Court of Canada's dual purpose objective is just that – it is settled by judge-made case law and not an affirmative statutory statement as is the case in the United States. She writes, “[t]he balancing approach, while in some cases offering greater scope to the interpretation of rights of users, is an extremely imprecise tool that can easily be wielded by different judges with very different outcomes. It should also not be forgotten that the balancing approach is court-mandated, and not set out in the constitution as it is in the United States”.¹⁰⁶ What is needed is a clear, unequivocal pronouncement in the statute itself, through statutory reform.

Secondly, no matter how broadly and expansively the fair dealing exceptions are interpreted by Canadian courts, the wording of the *Copyright Act* itself has not budged. The judiciary can only work within the bounds of the narrow boundaries of the *Copyright Act*. Judge Teitelbaum's dictum that the judiciary cannot encroach on Parliament's role to create new purposes under fair dealing still rings true today.¹⁰⁷ Craig explains, “[t]he onus remains upon Parliament to continuously develop new exceptions in the face of new challenges; the role of the courts is to assess whether the case at hand meets the specific demands of the fair dealing defence”.¹⁰⁸ Consequently, an artist's use of a copyrighted work may well constitute ‘fair’ dealing within the factors set out in *CCH*, but such a victory is futile because she must first fit the use within the exhaustive purposes. This is compared to the United States, where courts concentrates on whether a use is ‘fair’ through applying the four factors instead of judicial pigeon-holing as to the purpose of use. Scassa cautions that the recent developments are not the end all solution:

The cases do demonstrate a strong commitment by the Supreme Court of Canada to take into account users

¹⁰⁶ Teresa Scassa, “Users’ Rights in the Balance: Recent Developments in Copyright Law at the Supreme Court of Canada” (2005) 11 C.I.P.R. 133 at 135.

¹⁰⁷ *Michelin*, *supra* note 10 at 381.

¹⁰⁸ Carys Craig, “The Changing Face of Fair Dealing in Canadian Copyright Law: A Proposal for Legislative Reform” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 437 at 456.

interests, and to some extent, broader societal interest in interpreting and applying the Act. The decisions, however, cannot be regarded as an unequivocal victory for users' rights in Canada...Any balance struck in interpreting the Act is substantially affected by the balance (or lack of balance) crafted in the legislation by Parliament.¹⁰⁹

Théberge and *CCH* represent a positive turn for appropriation artists. However, they are not a substitute to much-needed parliamentary copyright reform.

For the appropriation artist, the greatest clout that comes out of the recent Supreme Court of Canada developments lies in a prospective *Charter* challenge of the *Copyright Act*. Although a full examination of the relationship between freedom of expression and copyright is beyond the scope of this paper, the possibility of a *Charter* challenge merits a brief discussion.¹¹⁰ The *Copyright Act* has largely avoided *Charter* scrutiny, apart from the case of *Michelin* where the freedom of expression issue was easily dismissed by the Court. Scholars have fiercely argued that as an act of Parliament, the *Copyright Act* must comply with principles of the Charter including the freedom of expression right. Craig explains, "Section 2(b) of the *Charter* constitutionally guarantees freedom of expression, while the *Copyright Act* creates an exclusionary interest over the expression of an idea fixed in tangible form. Put in this way, the question is not whether the *Copyright Act* is constitutionally questionable, but, rather, how can it be anything but?"¹¹¹

Craig attributes this avoidance to an assumption that the *Act* already encompasses mechanisms to accord Canadian copyright with freedom of expression, including the fair dealing provisions and the idea and expression

¹⁰⁹ *Scassa, supra* note 106 at 141.

¹¹⁰ For an expanded discussion on the relationship between freedom of expression and copyright, see generally *supra* note 37. See also *supra* note 19 and *supra* note 36.

¹¹¹ *Craig, supra* note 36 at 77; see also *Bailey, supra* note 38 at 141. "[S]ince copyright exists in Canada only as a result of its statutory creation in the Act, the existence of any such property right is dependent upon the constitutional validity of the legislation purporting to grant it".

dichotomy.¹¹² Given the fact that the monopoly right conferred amounts to a private censorship, as was the case in *Michelin*, these assumptions clearly require revisiting. A section 2(b) *Charter* challenge against the *Copyright Act* itself has a greater likelihood of success in a judicial milieu that recognizes the dual purposes of copyright. For instance, in *Michelin* the Court identified the pressing and substantial objective of the *Copyright Act* as solely “the protection of authors and ensuring that they are recompensed for their creative energies and works”.¹¹³ In light of the decision of *Théberge* the public interest objective would also have to be considered as pressing and substantial for the purposes of the *Oakes* analysis. This dual purpose makes an incredible difference in the balancing process mandated under *Oakes*:

The key issue would turn on the minimal impairment inquiry – that the *Copyright Act* fails to strike an appropriate balance between authors’ rights and users’ rights. Given that fair dealing provisions do not include parody as a justifiable purpose, it could be successfully argued that the *Act* is under-inclusive. The potential of a *Charter* challenge in widening the scope of the fair dealing provisions is explained by Bailey:

The emphasis in *Théberge* on users’ rights and the related importance of access to and use of others’ expression in the innovation process, could well be used to suggest the user rights articulated in the *Act* are under-inclusive. To the extent, for example, that fair dealing does not include copying expression that is as socially and politically important as whistle blowing and parody, the *Act* may well restrict more expression than is reasonably necessary.¹¹⁴

Fewer suggests that a likely remedy would be the reading in of the phrase ‘for purposes including’, and goes as far as arguing the determination of ‘fair’ be expanded “to embrace otherwise infringing uses that nonetheless lie close to the core values protected by freedom of expression”.¹¹⁵

¹¹² Carys J. Craig, “Putting the Community in Communication: Dissolving the Conflict Between Freedom of Expression and Copyright” (2006) 56 U.T.L.J. 75 at 77.

¹¹³ *Michelin*, *supra* note 10 at 115.

¹¹⁴ *Bailey*, *supra* note 38 at 151.

¹¹⁵ *Fewer*, *supra* note 37 at 233-234.

Despite a possible *Charter* challenge of the *Copyright Act*, such a route has little practical chance of success. *Charter* litigation is extremely lengthy and expensive to fund. It would likely take years before appropriation artists get a final and favourable decision. Again, the lack of recourse appropriation artists have, in spite of the promising decisions by the Supreme Court of Canada, shows the need for parliamentary reform. It is incumbent on Parliament to make the necessary changes so that the *Copyright Act* reflects the positive turn made by the Supreme Court of Canada.

The Need for Statutory Reform: Moving Towards the American Fair Use Standard

It is glaringly apparent that the fair dealing exceptions must be remodelled to reflect the spirit of the Court's ruling in *Théberge* and *CCH*. Until then, Canadian artists who use postmodern appropriation practices will continue to work under a regime that stifles creative expression, and the public will continue to fail to benefit from these socially-integral works. Bill C-60, introduced in June of 2005 as proposals to copyright reform, was completely silent on any expansion of the fair use exceptions.¹¹⁶ The government has completely disregarded the Court's dictum in *CCH*, that fair dealing must be interpreted broadly as a 'user's right'.¹¹⁷ This comes as a huge disappointment, as felt by a coalition of Canadian artists who go by the name of 'Appropriation Art'. The following is an excerpt from their June 2006 open letter to the then Minister of Industry, Maxime Bernier and the then Minister of Canadian Heritage, Bev Oda,

Artists and other creators require Certainty of Access. Artists who use appropriation in their practice, rely on Canada's fair dealing exception to create. Fair dealing is a narrow right, perhaps at times too narrow to support this work. Creators should enjoy the support of the law, and not have to work under conditions of uncertainty. The work we speak of here does not compete with that of its subject, nor does the value of this work derive from the value of its

¹¹⁶ Bill C-60, *An Act to amend the Copyright Act*, 1st Sess., 38th Parl., 2005.

¹¹⁷ *C.C.H.*, *supra* note 92 at 48.

subject. The time has come for the Canadian government to consider replacing fair dealing with a broader defence, such as fair use, that will offer artists the certainty they require to create.¹¹⁸

Bill C-60 was not formally adopted before the dissolution of the Liberal government in 2005, and a new bill has yet to be tabled. In January, 2007, Michael Geist gave a presentation on fair use to Canadian Heritage's Copyright Policy Branch. Geist's presentation, entitled 'The Case for Fair Use in Canada,' argued that Canada should adopt a fair use standard such as the United States. He raised seven reasons for the expansion of fair dealing, such as a consistency with the Supreme Court of Canada's conception of copyright, and a consistency with emerging artistic needs and practices.¹¹⁹

Aligning the Canadian fair dealing provision with the American fair use doctrine is not a flawless, end- all solution. American artists who employ appropriation practices in their works are still encumbered by threats of expensive litigation, as evidenced by the hefty \$2 million in legal fees incurred by Forsythe in *Mattel*.¹²⁰ Moreover, the fundamental question of whether a dealing is 'fair' is a case-by-case, fact-specific inquiry that ultimately comes down to a particular judge's determination. This renders the determination of 'fair' susceptible to a judge's subjective predilections of what constitutes 'good' or 'bad' art as was seen in the judicial reasoning in *Michelin* and *Rogers*.¹²¹ Despite these inadequacies, a fair dealing provision akin to the American fair use doctrine would nonetheless be an enormous benefit to appropriation artists in Canada who currently have little recourse under the existing *Copyright Act*. The case law on fair use in respect to appropriation practices has already been widely established in the United States. The Canadian jurisprudence would only have to gain from the principled

118 Open letter from Appropriation Art: A Coalition of Art Professionals to Minister of Industry Maxime Bernier and Minister of Canadian Heritage Bev Oda (6 June, 2006) on Appropriation Art online: Appropriation Art, http://www.appropriationart.ca/?page_id=3.

119 Michael Geist, "The Case for Fair Use in Canada: *Michael Geist Blog* (25 January, 2007), online: Michael Geist's Blog <http://www.michaelgeist.ca/content/view/1637/125/>.

120 *Mattel*, *supra* note 7.

121 For a thorough discussion on a tendency of judges to assess the quality and merits of artistic works, see generally Christine Haight Farley, "Judging Art" (2004) Tul. L. Rev. 805.

reasoning that has evolved since *Rogers*. A fair use standard would certainly open up the opportunity for Canadian courts to follow the rather progressive stance espoused by the American courts in *Mattel* and *Blanch*.

Furthermore, as postmodern artistic practices gain recognition in aesthetic studies, American courts are now giving credence to expert testimony of art historians and philosophers to help facilitate informed decision-making. In *Mattel* the Court relied upon an expert witness report by Douglas Nickel, an art history expert and curator at the San Francisco Museum of Modern Art. Nickel's report provided an account of the traditional practices of contemporary artists, serving as an insightful backdrop to a full understanding of Forsythe's works. Just as psychologists are relied upon by courts for a better understanding of an accused's sanity, so can aesthetic scholars be relied upon for a better understanding of artistic practices.¹²² An artist's legal counsel would be astute to take advantage of experts who are well-versed in the aesthetic discipline. In the famous words of Justice Holmes, this sort of expert testimony would help a judge learn "the new language in which [the] author spoke".¹²³

CONCLUDING REMARKS

It is a trite observation that artists are integral to society, to understanding the intricacies of our values, beliefs, and even our faults. Noted Canadian scholar, Marshall McLuhan, once wrote, "I think of art, at its most significant, as a DEW line, a Distant Early Warning system that can always be relied on to tell the old culture what is beginning to happen to it".¹²⁴ The current Canadian copyright regime is failing both artists and the society that ought to benefit from creative works. Despite a clear decree by the Supreme Court

¹²² *Ibid.* at 840.

¹²³ *Bleistein, supra* note 2 at 251.

¹²⁴ Marshall McLuhan, *Understanding Media: The Extensions of Man*, (New York: McGraw Hill, 1964) at 22.

of Canada, the only realistic avenue towards allowing appropriation practices is through parliamentary reform akin to the American fair use doctrine. Until then, the Distant Early Warning system will continue to be crippled by a regime that should instead help it flourish.

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